14-4375-cv(L)

14-4378-cv(XAP)

In the
United States Court of Appeals
for the Second Circuit

IN RE: VITAMIN C ANTITRUST LITIGATION

THE RANIS COMPANY, INC.,

Appellant-Cross-Appellee,

—against—

HEBEI WELCOME PHARMACEUTICAL CO. LTD., and NORTH CHINA PHARMACEUTICAL GROUP CORPORATION,

Appellees-Cross-Appellants.

On Appeal From the United States District Court
For the Eastern District of New York

REPLY BRIEF FOR APPELLEE-CROSS-APPELLANT HEBEI WELCOME PHARMACEUTICAL CO. LTD.

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INTRODUCTION

The Ranis Company's ("Ranis") response to Hebei Welcome Pharmaceutical Co. Ltd.'s ("Hebei") cross-appeal accuses Hebei of offering "kitchen sink" arguments and of failing to raise "serious" issues. But Ranis then fails to defend most of the reasoning of the district court below. In several instances, Ranis does not even address Hebei's arguments at all. Ranis' failure to offer a meaningful defense of the district court's order as to Hebei is telling, and the arguments it does advance are uniformly unconvincing. This Court should therefore reverse the district court's enforcement order to the extent that it (i) allowed alternate service of a restraining notice to Hebei, (ii) declined to dissolve the restraining notices to Hebei's banks, and (iii) issued a turnover order against Hebei.

ARGUMENT

I. RANIS OFFERS NO BASIS FOR ALTERNATIVE SERVICE OF THE RESTRAINING NOTICE

Ranis does not defend the district court's recourse to alternate service under Federal Rule of Civil Procedure 4(f)(3). It instead offers an entirely new argument on appeal: that C.P.L.R. § 311 makes the Hague Convention inapplicable. Ranis Response Br. at 15-16. The argument is meritless.

In the first place, Ranis is wrong that C.P.L.R. § 311 would allow service on Hebei through its attorneys by default. An attorney is only

an agent for service of process under C.P.L.R. § 311(a)(1) to the extent authorized by the corporate client. *See 6 Davis Assocs., Inc., v. Rye Castle Apartment Owners, Inc.*, 242 A.D.2d 528, 529 (2d Dep't 1997). It is uncontested that Hebei's attorneys were not authorized to accept service of the restraining notice. *See In re Vitamin C Antitrust Litig.*, 1:06-md-01738-BMC-JO, Dkt. 886-3 Ex. Y (E.D.N.Y. May 9, 2014). Service on Hebei's attorneys therefore does not satisfy C.P.L.R. § 311(a)(1).

Further, alternate service under C.P.L.R. § 311(b) is only authorized if the party seeking alternate service makes a motion affirmatively showing that ordinary service is "impracticable," i.e., "that the other prescribed methods of service *could not* be made." *Davis v. Total Identity Corp.*, 50 A.D.3d 1484, 1485 (4th Dep't 2008) (quoting (*Markoff v. S. Nassau Cmty. Hosp.*, 91 A.D.2d 1064, 1065 (2d Dep't 1983), *aff'd*, 61 N.Y.2d 283 (1984)) (emphasis added). Ranis did not file a motion making such a showing, nor are there any facts in the record (beyond Ranis' and the district judge's speculation) establishing that Hague Convention service could not be made. *See Yamamoto v. Yamamoto*, 43 A.D.3d 372, 373 (1st Dep't 2007) (rejecting service on defendant's attorneys in favor of Hague Convention procedures). C.P.L.R. § 311 thus provides no support for the district court's authorization of non-Hague Convention service.

More importantly, C.P.L.R. § 311 does not govern the method for serving the restraining notice in federal court; Federal Rule of Civil Procedure 4 does. *See Schneider v. Nat'l R.R. Passenger Corp.*, 72 F.3d 17, 19-20 (2d Cir. 1995) (applying federal rule regulating service of process to service of writ of execution and noting "if there is an applicable federal statute, it is controlling, as is also any relevant Civil Rule, since those rules have the force of a statute.") (internal marks and citation omitted). So while C.P.L.R. § 5222(a) imposes the requirement that a restraining notice be served "personally in the same manner as a summons" (which Ranis no longer disputes that federal courts must apply), the actual method of service is governed by Rule 4.

Ranis cites *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988), as support for applying the state rule instead of the Hague Convention where "the law of the forum permits service in a manner that does not require transmission of documents abroad[.]" Ranis Response Br. at 15-16. But the *Schlunk* case arose from a state-court proceeding not subject to Rule 4. *See* 486 U.S. at 696-97. The holding of *Schlunk* Ranis alludes to allowing service on a general agent in state court therefore does not support Ranis' position.

Given the lack of any dispute on this appeal that Ranis was obliged to serve its restraining notice to Hebei "personally in the same manner as a summons," C.P.L.R. § 5222(a), there is no avoiding the requirements of Rule 4. Since China and the United States are both

signatories to the Hague Convention, and Hebei is a citizen of China, the proper means of service under Rule 4 was by a request to China's Ministry of Justice. Given that recourse to the Hague Convention is mandatory where the Convention applies (*Schlunk*, 486 U.S. at 705), the district court necessarily abused its discretion by authorizing alternate service without first requiring Ranis to attempt service via the Hague Convention. Its order should therefore be reversed and the restraining notice vacated as improperly served.

II. IT IS UNDISPUTED THAT HEBEI HAS NO ASSETS IN NEW YORK BANK BRANCHES, SO THE SEPARATE ENTITY RULE REQUIRES DISSOLUTION OF THE RESTRAINING NOTICES TO HEBEI'S BANKS

Ranis offers no defense of the restraining notices as to Hebei's banks other than to claim that "if there are assets associated with New York branches of those banks, the restraining notices were and continue to be effective." Ranis Response Br. at 16. But it is undisputed that Hebei does not have assets in the United States, let alone New York. *See* J.A.154 ¶¶ 2-3, 223 ¶ 2, & 373 ¶ 4. This Court has held that restraining notices to banks should be vacated where the assets putatively subject to restraint are held abroad. *See Motorola Credit Corp. v. Standard Chartered Bank*, 771 F.3d 160, 161 (2d Cir. 2014) (directing vacatur of restraining notices in light of *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149 (2014)). The restraining notices as to Hebei's banks should therefore be vacated.

III. RANIS' DEFENSES OF THE TURNOVER ORDER FAIL

A. Ranis Cannot Show That the Turnover Order Comports With Article III

Ranis does not distinguish this Court's holding that Article III deprives federal courts of jurisdiction to direct enforcement against assets that "no longer exist[.]" *See Exp.-Imp. Bank of the Republic of China v. Grenada*, 768 F.3d 75, 86-87 (2d Cir. 2014) (quoting *Fidelity Partners, Inc. v. First Trust Co.*, 142 F.3d 560, 564–66 (2d Cir. 1998)). *Cf.* Ranis Response Br. at 16-17. Nor does it actually raise a genuine dispute as to whether the accounts subject to the turnover order in fact exist given that uncontroverted evidence establishes they do not. *See* J.A.223 ¶ 2. Ranis' only argument—that Hebei is inherently in compliance with the order (as there are no assets to turn over), Ranis Response Br. at 17—amounts to a concession that the order is improper. An order to turn over non-existent assets if, contrary to the record, they in fact exist is inherently hypothetical. This Court should therefore vacate the turnover order as beyond the scope of the district court's authority.[1]

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[1] In a footnote, Ranis makes assertions about post-judgment discovery issues. Ranis Response Br. at 17 n.1. Those issues are not in the record before this Court, and therefore are beyond the scope of this Court's review. *See United States v. Apple Inc.*, Nos. 14-60, 14-61, --- F.3d ----, 2015 WL 3405534, at *6 (2d Cir. May 28, 2015). Ranis criticizes Hebei for not appealing the district court's post-judgment discovery order, but discovery orders are generally not appealable and no exception to that rule applies here. *See Yukos Capital S.A.R.L. v. Samaraneftegaz*, 592 Fed. Appx. 28, 29 (2d Cir. 2015) (citing *In re Am. Preferred Prescription, Inc.*, 255 F.3d 87, 92–93 (2d (continued...)

B. Ranis Fails to Show That a Bank Account is in the *Actual* Possession of the Account Holder as Required by C.P.L.R. § 5225(a)

Ranis, like the district court, relies on *dicta* in *Commonwealth of the Northern Mariana Islands v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55 (2013) ("*NMI*"), to claim that bank accounts are in the "possession or custody" of a judgment debtor. Ranis Response Br. at 17-19. In that passage, the Court of Appeals observed that prior lower court decisions were distinguishable to the extent that they assumed the assets at issue were in the actual possession of the judgment debtor. *See* 21 N.Y.3d at 64.

But the actual holding of the case was "'possession, custody or control' contemplates constructive possession, whereas 'possession or custody,' by its omission of the term 'control,' refers to actual possession. Accordingly, a section 5225(b) turnover order cannot be issued against a garnishee lacking actual possession or custody of a judgment debtor's assets or property." *Id.* at 63. It is therefore clear after *NMI* that constructive possession is not "possession or custody" for purposes of C.P.L.R. § 5225.

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Cir. 2001)). In any event, Hebei has offered substantial defenses to Ranis' contempt motion in the district court. *See generally In re Vitamin C Antitrust Litig.*, 1:06-md-01738-BMC-JO, Dkt. No. 925 at 1-8 (E.D.N.Y. Apr. 17, 2015).

That point is dispositive because the holder of a bank account only has constructive possession of the funds in the account. *See United States v. Fid. Phila. Trust Co.*, 459 F.2d 771, 776 (3d Cir. 1972); *In re Lee*, 35 B.R. 452, 456 (Bankr. N.D. Ga. 1983). It is the bank, not the account holder, that has actual possession of the funds. *See Fahey v. O'Melveny & Myers*, 200 F.2d 420, 438 (9th Cir. 1952). *Accord Henderson v. United States*, 135 S. Ct. 1780, 1784 (2015) ("Actual possession exists when a person has direct physical control over a thing. . . . Constructive possession is established when a person, though lacking such physical custody, still has the power and intent to exercise control over the object.") (citations omitted).

Ranis makes no attempt to show that an account holder's relationship with bank account funds can be anything other than constructive possession, so a straightforward application of the holding in *NMI* demonstrates that the proper garnishee for a judgment debtor's funds in a bank account is the bank, not the judgment debtor. The district court's contrary holding should therefore be reversed, and the turnover order to Hebei should be vacated for this reason as well.

IV. RANIS' BRAND-NEW RESPONSES TO HEBEI'S CONSTITUTIONAL ARGUMENTS ARE WITHOUT MERIT

Ranis never responded to Hebei's constitutional objections to the restraining notices and turnover order in the district court, but now it ventures a response for the first time on appeal. Ranis Response Br. at

19-20. Given Ranis' failure to even respond to Hebei's Constitutional objections in the district court, this Court should decline to consider its new arguments. *See People of the State of New York v. Actavis plc*, No. 14-4624, --- F.3d ----, 2015 WL 3405461, at *16 (2d Cir. May 22, 2015).

Ranis' arguments are meritless in any event. It relies on the general rule that personal jurisdiction does not need to be established separately for judgment-enforcement proceedings, but it makes no effort whatsoever to show how the state of New York has *legislative authority* to regulate the disposition of assets held by a non-citizen abroad under the C.P.L.R. *Compare* Ranis Response Br. at 20 *with* Hebei Opening Br. at 40-41. Ranis has therefore failed to respond to the legislative jurisdiction issue in this Court as well as in the district court.

As to the Commerce Clause issue, Ranis claims that "[t]his Court has approved of the extraterritorial reach of a New York turnover order to enforce a U.S. district court judgment." *Id.* (citing *Koehler v. Bank of Bermuda Ltd.*, 577 F.3d 497 (2d Cir. 2009)). But the *Koehler* decision simply applied the state-law rule in accordance with the answer of the New York Court of Appeals to a certified question. *See* 577 F.3d at 499. The validity of that rule as applied to regulate the disposition of foreign assets held by foreign citizens under the Commerce Clause was not presented (nor was any Constitutional question). *Id.*

Contrary to Ranis' incorrect characterization of *Koehler*, controlling precedent in fact establishes that a state's attempt to

regulate commercial activity by non-residents outside of the state's borders is a *per se* violation of the Commerce Clause. *See Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 216 (2d Cir. 2004) (citing *Healy v. The Beer Inst.*, 491 U.S. 324, 336 (1989)). Ranis never grapples with this authority, thus continuing its failure to respond to Hebei's Commerce Clause objection.

The Supreme Court reaffirmed mere weeks ago that the U.S. Constitution sharply limits a state's authority to impose on commercial activities outside of its border, even those *of its own residents*. *See Comptroller of the Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, 1799 (2015) ("Legion are the cases in which we have considered and even upheld dormant Commerce Clause challenges brought by residents to taxes that the State had the jurisdictional power to impose."). Since Ranis has offered no argument for how New York could possibly have the Constitutional authority to regulate the disposition of a Chinese company's assets held entirely abroad, this Court should hold that such an application of C.P.L.R. Article 52 violates due process and the Commerce Clause. The turnover order and restraining notices should be vacated on these grounds as well.

CONCLUSION

For the foregoing additional reasons, the district court's grant of enforcement orders against Hebei should be reversed and the restraining notices and turnover order at issue should be vacated.

Dated: June 12, 2015

Respectfully submitted,

s/ Daniel P. Weick

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CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 2,200 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it was prepared in Microsoft Office Word in 14-point, proportionally spaced Century Schoolbook font.

s/ Daniel P. Weick
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